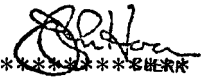


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**  
FEB 29 2008



\*\*\*\*\*

JERRY S. EMBERLIN,

Plaintiff,

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

CIV 06-4136

**OPINION AND ORDER**

\*\*\*\*\*

Pending before the Court are the Plaintiff's Objections (Doc. 16) to the Magistrate Judge's Report and Recommendation (Doc. 15). This Court referred the case to United States Magistrate Judge John E. Simko for the purpose of issuing a Report and Recommendation. The Magistrate Judge has recommended that Plaintiff's Motion for Summary Judgment (Doc. 10) be GRANTED, and that the Commissioner's denial of benefits be reversed and remanded for reconsideration and further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). Plaintiff objects to the remand for reconsideration and requests remand of the case with an Order that the Commissioner award benefits.

A sentence four remand is proper when the District Court makes a substantive ruling regarding the correctness of the Commissioner's decision and remands the case in accordance with such ruling. *Buckner v. Apfel*, 213 F.3d 1006, 1010 (8<sup>th</sup> Cir. 2000). Remand with instructions to award benefits is appropriate "only if the record overwhelmingly supports such a finding." *Buckner* at 1011. In the face of a finding of an improper denial of benefits, but the absence of overwhelming evidence to support a disability finding by the Court, out of deference to the ALJ the proper course is to remand for further administrative findings. *Id.*, *Cox v. Apfel*, 160 F.3d 1203, 1210 (8<sup>th</sup> Cir. 1998).

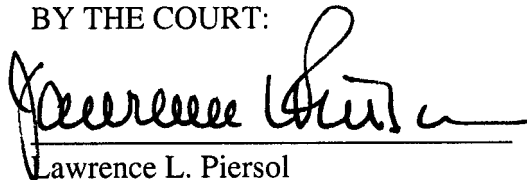
The Court has carefully reviewed the Magistrate Judge's Report and Recommendation, the Plaintiff's objections, the Defendant's Response to Plaintiff's Objections, and the record of the administrative proceedings. Contrary to Plaintiff's position, the record does not contain "overwhelming" evidence that would warrant a sentence four reversal. Also, the Report and Recommendation does not make a separate finding regarding Plaintiff's credibility. Instead, Judge Simko's Report and Recommendation found that "the ALJ's credibility finding regarding Mr. Emberlin's pain complaints and resulting limitations is not supported by substantial evidence." On remand, the ALJ will have to fully consider all relevant evidence for the findings to be made. Accordingly,

IT IS ORDERED:

1. That Plaintiff's objections are **OVERRULED** and the Magistrate Judge's Report and Recommendation is **ADOPTED** by the Court.
2. That Plaintiff's Motion for Summary Judgment (Doc. 10) is **GRANTED**.
3. That the Commissioner's decision is **REVERSED** under sentence four of 42 U.S.C. § 405(g) and the case is **REMANDED** to the Commissioner for further administrative proceedings as set forth above.

Dated this 29<sup>th</sup> day of February, 2008.

BY THE COURT:



Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

BY:   
DEPUTY